

**Hoffman Manor and Local 1115, Long Island Service
Employees International Union, AFL-CIO. Case
29-CA-23168**

January 31, 2001

DECISION AND ORDER

**BY CHAIRMAN TRUESDALE AND MEMBERS
HURTGEN AND WALSH**

On August 11, 2000, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hoffman Manor, Long Beach, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Joanna Piepgrass, Esq., for the General Counsel.

Matthew DeMarco, Esq. and *Carl A. Schwarz Jr., Esq.*

(*Schwarz & DeMarco*), for the Respondent.

Eric La Ruffa, Esq., for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in Brooklyn, New York, on May 24, 2000. The charge was filed on December 6, 1999, and a complaint was issued by the Regional Director on January 21, 2000. In substance, the complaint alleges that on November 9, 1999, the Employer discharged its employee Linda Orellana sought to the assistance of the Union and sought to join it.

On the entire record in this case, including my observation of the demeanor of the witnesses and after reviewing the briefs filed, I hereby make the following

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Although Member Hurtgen agrees with the judge's conclusion that the discharge of Orellana was unlawful, he does not agree with the judge's rationale. The judge relied "particularly" on a finding that the Respondent's stated reasons for the discharge were incredible. Member Hurtgen relies more heavily on the fact that Respondent decided to discharge Orellana when it learned she was visiting the Union's office.

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the Union, is a labor organization as defined in the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Company operates a residential facility for older people which is not a nursing home. It employs about 15 people in various categories and its manager is Raphael Hoffman. He is the son of the previous owner, Andres Hoffman.

For at least 30 years, there has been a collective-bargaining relationship between the Respondent and the Union. At the time of these events there was in existence, a collective-bargaining agreement that was executed in 1994, and which had been extended for three more years in 1997. (The duration of the extension is from February 1, 1997, to February 1, 2000.) The contract covered nonsupervisory and nonprofessional employees and specifically included receptionists/switchboard operators. Under the explicit terms of that contract, new employees are required to become union members after 30 days but are kept in probationary status for 60 days. Also, the contract requires that contributions to the welfare and legal funds begin after an person is employed for 30 days.

For 20 years, the shop steward for the Union at the Respondent has been the housekeeper, Marina Quesada. While there was some evidence which suggested that she may have been considered a supervisor, the record is not determinative of such a conclusion.

In any event, the evidence shows that the relationship between the Respondent and the Union was somewhat cozy. Perhaps too cozy. There were, for example, no grievances ever initiated by Quesada during her time as shop steward. Contrary to the explicit provisions of the collective-bargaining agreement, the employer made it a practice to require new employees to undergo a 90-day probationary period. Also, contrary to the explicit terms of the contract, the employer apparently had a practice of not notifying the Union when new employees were hired and did not commence making payments to the contractually required benefit funds until after 90 days. Moreover, new employees seem to have been told that they were not eligible to become union members until after completion, after 90 days, of their probationary period. The evidence does not indicate the extent to which the Union was aware of these practices or whether it condoned them.

During the summer and fall of 1999, another labor organization attempted to organize employees of this and other similar companies having contracts with Local 1115. Ultimately this led to a series of elections and at this Respondent, the incumbent won and was certified. I have no information as to how another union obtained a sufficient showing of interest to challenge the incumbent, although one is tempted to speculate that perhaps it was because of a lack of vigorous enforcement of the existing labor agreements.

Linda Orellana was hired in July 1999 to be one of three receptionist/switchboard operators and began work on or about

July 26. There are three shifts per day, each manned by a separate person. At the time of her initial interview, she was told that it was very important that she not be absent or late. According to Orellana, at the time of her interview she was introduced to Marina Quesada who was described to her as the shop steward. Orellana claims that she didn't know at that time, what the term shop steward meant.

There is no evidence to suggest that Linda Orellana played any role whatsoever for either union during the election campaign.

About a month after her hire, Orellana was scheduled for surgery and notified Raphael Hoffman that she would be in the hospital for a short time. Because of complications, she had to go back into the hospital and was out of work for a longer time than had been anticipated. She returned to work on Monday September 13, 1999, and acknowledges that when she returned to work, Hoffman was angry with her, ostensibly because she took so much time off and he had to get other people to cover for her at the switchboard. At the time that this happened, Hoffman's father had recently died and he had taken over as the president of the company.

From the records and considering that Orellana's normal days off were on Sunday and Thursday, she was out of work due to this operation for a total of 10 days. (From Tues., Aug. 31 to Sat., Sept. 11). During the period of her absence, she called in every day.

The company's records indicate that at most, Orellana was out sick for an additional 3 days of which at least one and perhaps 2, were days when she showed up for work at her normal time but was sent home by Hoffman or Supervisor Perlick because she appeared to be too ill to continue.

According to Orellana, after returning to work, she noticed that Quesada had some paraphernalia with Local 1115 logos and realized, after talking to her husband, that she worked at a union shop. She testified that in late October 1999, she asked Hoffman if she had successfully completed her probationary period and he said that everything was fine and that the residents liked her. Orellana credibly testified that she then asked about the Union and Hoffman responded that there was some kind of merger going on, that he didn't know what was happening with the Union, and that he didn't even know if there was going to be a union at all. (Evidently, he must have been referring to the pending representation case and the upcoming election which could, theoretically, have resulted in either a change in unions or no union at all).

Orellana testified that on the same day, after she got home, she called a person in the kitchen who gave her the Union's phone number and she called and spoke to a woman named Stacy. (Stacy Kortkamp, the Union's accounts receivable manager.) Orellana testified that when she gave her name and social security number, Stacy told her that she had no record of her working at Hoffman Manor.

According to Orellana, she visited the Union's office on Tuesday, October 26, 1999 (on her off hours), and spoke to Stacy. She was told that the shop steward was supposed to give her a form to sign and that Stacy then called the Respondent and asked to speak to Hoffman. After, this Orellana was intro-

duced to a union representative named Diego and she filled out a union form while at the office.

Stacy Kortkamp credibly testified that when she spoke to Hoffman and asked how come the company was not making contributions on Orellana's behalf, he responded by saying, "She no longer—As of today, she is terminated." This was denied by Hoffman.

Notwithstanding the phone conversation between Kortkamp and Hoffman, Orellana continued to work for another week.

In the early hours of Monday, November 8, 1999, Orellana's young son fell out of bed and banged his head. She thereupon called the company at about 3 a.m., spoke to Alma and told her that she would not be in as she intended to take her son to the doctor. Orellana had to wait for her husband to return from work and they left to go to the doctor's office at about 7:30 a.m. They were there for most of the day, while her son was X-rayed and examined.

The testimony of Marina Quesada shows that Hoffman, before 7 a.m. on Monday, was told by Alma, the night switchboard operator, that Orellana had called in to say that she would not be in because her son was injured and had to go to the doctor. He thereupon asked Marina Quesada to operate the switchboard when she arrived at 7:30 a.m.

Orellana was next scheduled to work on the evening shift on Tuesday, November 9. (On all days other than Tuesdays, she worked from 7 a.m. to 3 p.m.) As her son was OK, she testified that she called on Tuesday afternoon, spoke to Marina Quesada and told her that she was going to come to work on her regular shift. Indeed, she agreed to come in a little earlier inasmuch as Quesada said that her legs were swollen and she wanted to leave early.

According to Orellana, sometimes later in the day, she called back to ask Quesada if she could bring her anything and was told that she no longer had a job. Quesada told Orellana that she (Orellana) was irresponsible because she didn't call in. According to Orellana, when she spoke to Hoffman on Wednesday, November 10, he asserted that because she didn't call in he considered her irresponsible.

Raphael Hoffman asserts that he decided to fire Orellana because she had 18 absences during the brief time that she was employed, because she often was late for work and because on November 8, she was out from work without calling in. Obviously it was the last event which precipitated her discharge.

Apart from the fact that at most, Orellana was out 14 days and not 18 days, the key problem with the Respondent's asserted reason for discharging Orellana is that she did call in on Monday morning when her son was injured.¹ And Hoffman clearly was aware that Orellana called in because he told Quesada, before 7:30 a.m., that he had learned this from Alma who was the night switchboard operator. Also, as Orellana was not scheduled to come in until Tuesday evening, she did in fact call in on Tuesday afternoon to inform the company that she would be in as scheduled. (In the meantime, no one thought it advisable to call her on Tuesday to find out either if her son was

¹ In an affidavit given by Perlick, she stated that sometimes on Saturdays, Orellana would come in a little late. Nevertheless, Orellana never received any written warnings for this.

alright or if she was going to come in at her normal starting time at 8 p.m.

In my opinion, the reasons given by Hoffman for deciding to discharge Orellana simply do not wash. That by itself does not, however, affirmatively prove that the motivation for her discharge was because of any union activities on her part or because of any other protected concerted activity.

The complaint alleges that the Respondent was motivated in discharging Orellana because she sought to join the Union. The problem with this is that the company has had a comfortable relationship with this Union for at least 30 years. On its face, the mere fact that Orellana, as a new employee, sought to join the incumbent union, would not normally raise a suspicion that the company would discharge her for so doing.

Nevertheless, the circumstances in this case are somewhat unusual. For one thing, the management of the company changed with Raphael Hoffman taking over after his father had died. For another, at the time of these events, there was another union which was trying to oust the incumbent and therefore the previous comfortable relationship between the company and the incumbent was subject to a high degree of uncertainty. Another unusual thing about the incumbent relationship was that despite a written contract setting forth certain company obligations regarding new employees, the Respondent seems to have consistently, and over a period of time, disregarded those obligations. Thus, it did not notify the Union at the time when new employees were hired; it did not require that they join the Union after 30 days of employment; and it did not begin to remit dues or contractual benefit fund payments until after 90 days of employment. Thus, the company's practice was to try to save at least 2 months worth of benefit payments for each new employee hired.

In my opinion, the appearance at the Union's office by Orellana, a person who had previously expressed a somewhat litigious nature, was bound to alert in Hoffman's mind, the possibility that her continued presence on the job might jeopardize his company's too cozy relationship with a union which had previously had not been so vigilant in enforcing all of the terms of the collective-bargaining agreement. While I cannot read Hoffman's mind, I think that the evidence in this case fits such a theory, particularly as I think that his stated reasons for discharging Orellana were not credible.

CONCLUSIONS OF LAW

1. The Respondent, Hoffman Manor, violated Section 8(a)(1) and (3) of the Act by discharging its employee Linda Orellana because of her efforts to join Local 1115, Long Island Service Employees International Union, AFL-CIO.

2. The unfair labor practice found affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer her reinstatement and make her whole for

any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Hoffman Manor, Long Beach, New York, its officers, agents, successor, and assigns, shall

1. Cease and desist from

(a) Discharging employees who try to join Local 1115, Long Island Service Employees International Union, AFL-CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Linda Orellana full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Linda Orellana whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Linda Orellana in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days or a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Long Beach, New York, copies of the attached noticed marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 9, 1999. (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge any employees because they join or try to join Local 1115, Long Island Service Employees International Union, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Linda Orellana, full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL, make Linda Orellana whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Linda Orellana, and WE WILL within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

HOFFMAN MANOR